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IN THE

Supreme Court of the United States

October Term, 1994

VEMCO, INC.,
Petitioner,

vs.

JOHN CAMARDELLA, THOMAS E. MARK, RICHARD AQUINO, JOHN DOE(s) and FLAKT, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

1. Does the fact that predicate acts which take multiple forms intended to obtain various amounts to be paid at different times all relate to a single construction project prevent those predicate acts from constituting multiple schemes under the Racketeer Influenced and Corrupt Act (RICO)?

2. Does the fact that predicate acts were taken in violation of a court order immunize those acts from ever counting as part of a pattern of racketeering along with earlier predicate acts under the Racketeer Influenced and Corrupt Act (RICO)?

3. May the actions of alleged racketeers involving a single victim and a single scheme for a single purpose over four years, ever constitute the type of conduct Congress sought to prohibit with the Racketeer Influenced and Corrupt Organization Act (RICO)?

PARTIES BELOW

The names of all parties to the proceedings below appear in the caption of the case.

Information required by Rule 29.1, Rules of the Supreme Court:

Vemco, Inc. is owned by Venture Holdings Trust, a private trust.

Vemco, Inc. has no subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

Petitioner, Vemco, Inc., respectfully requests that a writ of certiorari be allowed to review the judgment of the United States Court of Appeals for the Sixth Circuit filed in this case on April 29, 1994 and that that judgment be summarily reversed.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Sixth Circuit, Case No. 93-1412 (April 29, 1994) (Appendix at A1) reported at 23 F.3d 129.

Report and Recommendation of the Magistrate Judge of the United States District Court for the Eastern District of Michigan, Southern Division—Flint, Case No. 91-CV-40256-FL filed September 17, 1992 (Appendix at A16).

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was filed on April 29, 1994. A petition for rehearing and suggestion for rehearing *en banc* was timely filed by Petitioner on May 13, 1994. The petition for rehearing was denied on July 7, 1994.

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case by writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1961(5):

> "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

Vemco, Inc. ("Vemco") filed this action in the United States District Court, Eastern District of Michigan, Southern Division. The complaint alleged violations of the Racketeer Influenced and Corrupt Organization Act [RICO], 18 U.S.C. §1962(a) and (c), conspiracy to commit fraud and common law fraud. The district court had jurisdiction pursuant to 18 U.S.C. §1964(c) and 28 U.S.C. §1334.

For purposes of this appeal the facts are as alleged in the amended complaint. Vemco is a Michigan company which manufactures and paints plastic automotive trim parts. In 1987, Vemco was considering the construction of a new manufacturing facility, of which a "paint finishing system" would be an integral part.

The Defendants conspired to fraudulently misrepresent that Flakt, Inc. ("Flakt") would build the necessary paint finishing system for a price not to exceed $15 million. In fact, the Defendants knew when they originally quoted the price in May 1987 that Flakt could not and would not build the system for $15 million. Nonetheless, the Defendants misrepresented the construction price in order to hook Vemco into retaining Flakt and committing itself to constructing the $80 million manufacturing plant.

Between May and November 1987, the Defendants repeated the fraudulently low $15 million price for the paint finishing system, and agreed that it would deliver a system meeting certain performance requirements. The misrepresentations were repeated by Defendant Aquino at May 14 and May 22 meetings, and by Defendants Camardella and Aquino at meetings held May 23 and June 11.

In addition, Defendants Camardella, Aquino and Mark met with Vemco representatives on November 15, 1987, and discussed Vemco's need to have much of the system operational by February 1988 in order to meet Vemco's crucial General Motors' contracts to produce parts for the 1989 model year Cadillac. The Defendants executed and witnessed a written contract by which they represented Flakt's intent to build the paint finishing system for $15 million according to the schedule discussed by Vemco, with the full system to be fully operational by September 1988.

At the time they made these misrepresentations, the Defendants knew that Flakt could not deliver the operational paint finishing system at the price to which they had committed. Internal pricing sheets generated in May 1987 demonstrated that the minimum price Flakt intended to charge Vemco far exceeded $15 million, even considering that Flakt intended not to include many of the system features upon which the parties had agreed. By November 1987, the Defendants had internally calculated that base costs would be almost $18 million.

In reliance upon the Defendants' fraudulent misrepresentations of Flakt's intentions, Vemco agreed to purchase the $15 million paint finishing system from Flakt and committed to the construction of its $80 million new plant. Vemco further signed the November 15 agreement with Flakt. As the Defendants anticipated, this contract placed Vemco in an extremely vulnerable position.

In addition to committing Vemco to contract with Flakt, the Defendants included Vemco's lenders, without which Vemco could not capitalize the plant and pay Flakt, in the scope of this scheme. In July 1987, Defendants Mark, Camardella, and Aquino reviewed and

approved that portion of Vemco's private placement memorandum which represented to Vemco's lenders that Flakt would construct the paint finishing system "for a total cost not to exceed a guaranteed maximum price of $15,000,000." Later, on December 15, 1987, Mark, with assistance from Aquino, issued a letter to Vemco's lenders, National Bank of Detroit, New York Life Insurance Company, Aid Association for Lutherans, The CIT Group/Equipment Financing, Inc. and Marine Midland Leasing Corporation U.S.A., confirming Flakt's $15 million price. Contrary to their representations to Vemco and its lenders, the Defendants intended to charge Vemco on a "cost-plus" basis, with "no cap" on the price and the Defendants did not reveal their knowledge that their own calculation of the minimum price for the system was almost $18 million. The Defendants made these additional fraudulent misrepresentations and omissions of fact to induce Vemco to borrow money and to induce Vemco's lenders to finance the project and release moneys which could be paid to Flakt.

On January 3, 1988, just about four days after Vemco received funds from its lender, the Defendants made their first claim for extra-contractual moneys, demanding payment of the substantial "OCR" charges which the Defendants had secretly accumulated since mid-July 1987.

Disputes over these amounts continued until late May 1988, when Flakt, through the individual Defendants, demanded more than $2.8 million. In order to fraudulently induce them to make the payment, Camardella wrote to Vemco and misrepresented that Flakt was ahead of schedule, the project was 99% completed, and Flakt would soon conduct performance

tests on the paint finishing system. Vemco then agreed to make a payment, conditioned upon receipt of sworn statements of amounts paid to subcontractors and subcontractor lien waivers, which the Defendants supplied. As further incentive for Vemco's payment, the Defendants procured a letter from Bjorn Stigson, an officer of Flakt's parent corporation, assuring that Flakt would meet its contractual obligations. Finally, at a June 3, 1988 meeting with Vemco and one of its lenders, Defendants Camardella and Mark fraudulently represented that the paint finishing system was only two weeks from completion, with only two "punch list" items to be finished, and that the system would be performance tested by June 20. Camardella on June 3 executed for Flakt a written Amendment to the original Agreement. Upon these inducements, Vemco paid Flakt more than $2.8 million at that meeting.

Contrary to their representations in May and June 1988, the Defendants knew at that time that the paint finishing system was not close to being operational. Internal Flakt documents informed Defendant Mark that, even as late as August 1988, the system was at least four weeks from performance testing and would probably not work. The misrepresentations were made to convince Vemco to make the more than $2.8 million payment, which the Defendants supported by fraudulently overstating amounts paid to subcontractors. Defendant Mark later admitted that Flakt had never intended to fulfill the June 3 written Amendment to the Agreement.

Notwithstanding Flakt's internal documents showing that the system was far from completed even by August 1988, Defendant Mark fraudulently wrote to Vemco on

June 28, representing that on June 20 Flakt had delivered to Vemco the fully functional paint finishing system. Mark repeated the representation in two additional letters written July 6 and 25, one of which he copied to Defendants Camardella and Aquino.

On July 1, 1988, Mark tried to extort a $4 million payment immediately. If Vemco did not make the payment, Mark threatened to conduct oppressive litigation against Vemco which he warned would occupy Vemco's key personnel with hearings and prevent them from operating Vemco's business. The Defendants understood that the presence of Vemco's personnel at the plant was essential at the time; indeed, the Defendants' failure or refusal to complete the paint finishing system or turn over certain documents made the key personnel critical to the plant operation. Mark further threatened to sue Vemco's lenders, ruin Vemco's credit, and drive Vemco out of business.

In August, 1988, Flakt left the project and took with it the plans and specifications necessary to complete the project's miles of electrical wiring and other details. The disappearance of the plans was calculated to prevent Vemco from completing the project, to further imperil Vemco's ability to meet commitments to customers, and to extort further payments from Vemco. On September 9, 1988, Vemco secured a court order (from the trial court in another action) compelling Flakt to turn over the plans and specifications. Notwithstanding the Order, the Defendants both obstructed justice and continued their extortion by withholding the plans and specifications so as to place Vemco in further financial distress and to convince Vemco to capitulate and pay further amounts demanded by Flakt. The Defendants also intended to

exacerbate the financial disparity between Flakt and Vemco, and to prolong the litigation which Vemco could not afford. These violations continued until July 1991, when the Defendants finally produced all of the documents.

While withholding the plans and specifications, Defendants Mark, Camardella, and Aquino met with representatives of Vemco on December 3, 1988, and renewed their extortive threats that they would continue litigation so as to occupy Vemco's key personnel and force losses to Vemco of $500,000 each month, unless Vemco met their demand for $4 million. After that, Flakt issued Vemco quarterly statements demanding $6 million plus interest, which constituted a shorthand communication repetitive of the threats made by the Defendants at the July 1 and December 3 meetings.

Thus the alleged predicate acts, which constituted mail fraud, wire fraud, extortion and obstruction of justice, extended from May 1987 until July 1991, a period of over four years.

Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) arguing that these facts fail to state a claim under RICO. The district court referred the Motion to Dismiss to the magistrate judge for preparation of a report and recommendation. The district court subsequently adopted in its entirety the report and recommendation of the magistrate judge (Appendix at A16) and dismissed the counts under §1962(a) and (c) and the count for conspiracy to defraud for failure to state a claim. The district court dismissed without prejudice the pendant state law fraud claim (Appendix at A12).

Vemco appealed the dismissal of Counts I and II, the claims under §1962(a) and (c). Vemco did not appeal the dismissal of the conspiracy claim. The Sixth Circuit rendered its decision April 29, 1994, affirming the dismissal of Counts I and II of Vemco's Amended Complaint (Appendix at A1). The court rested its dismissal of Count II on two grounds. First it stated:

> We do not find that a defendant who engages in several different forms of fraud for a single purpose, to defraud a single victim through activities surrounding one construction project, without more, has engaged in more than one criminal scheme.

(Appendix at A10). The problem with doing this is that the court missed two essential elements of Vemco's case: (i) that the predicate acts took more than one form (mail fraud, wire fraud, extortion and obstruction of justice) and (ii) the various forms of predicate acts were not merely intended to obtain a single dollar result, but along a time line continuum various predicate acts were committed which were intended at that time to obtain various discrete amounts which were to be paid at different times. The result was a variety of schemes, some of which succeeded, some of which did not, to obtain distinct amounts of moneys during distinct periods in the parties' relationship. For instance: (i) the successful scheme to withhold information regarding the true cost of the project with a view towards obtaining moneys at the closing of the bank loan, a scheme which was successful and resulted in a payment of more than $4,397,659 on December 30, 1987; (ii) the successful scheme to obtain $900,006 early in construction by withholding information regarding cost over runs until after the bank loan was obtained; (iii) the successful scheme to obtain $4,613,979 on February 4, 1988 of

payments from Vemco based upon a false representation as to the progress of the project; (iv) the successful scheme to obtain $2,868,791 on June 3, 1988 of payments from Vemco based uopn a false representation as to the progress of the project; (v) the unsuccessful scheme on May 31, 1988 to obtain $1,550,000 in fees for engineering/management services never performed and to obtain $628,630 based upon false waiver of liens; (vi) the unsuccessful scheme, which started July 1, 1988 and ended in July of 1991 to obtain, after the above-mentioned falsities were discovered, additional moneys from Vemco based upon extortive attempts and obstruction of justice.

The second ground for dismissing Count II of Vemco's Amended Complaint appears where the court stated:

> We cannot conclude that Flakt's alleged actions here, involving a single victim in a single scheme for a single purpose over seventeen months, constitute the type of "long term criminal conduct" Congress sought to prohibit with RICO. *See H.J., Inc.*, 492 U.S. at 241-42, 109 S.Ct. at 2902.

(Appendix at A10).

Here the court refused to consider Vemco's allegation that the Defendants' withholding of the specifications for the project's electrical system which continued until July 1991 constituted extortion and obstruction of justice and was to cause economic duress by causing Vemco to expend a significant amount of money to make the Vemco plant minimally functional. Further, while the panel recognized that it was declining to adopt the reasoning of the Second Circuit in *Procter & Gamble v. Big Apple Industrial Building, Inc.*, 879 F.2d

10 (2d Cir. 1989), *cert. denied* 493 U.S. 1022, 110 S. Ct. 723, 107 L. Ed. 2d 743 (1990), it overlooked that it was also ignoring the holding of *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 1106 L. Ed. 2d 195 (1989), which rejected the requirement of multiple schemes for a pattern of racketeering.

The Sixth Circuit denied Vemco's timely filed petition for rehearing on July 7, 1994 (Appendix at A35).

REASONS FOR ALLOWANCE OF THE WRIT

I. The decision of the Sixth Circuit in this case conflicts with the recent decision of this Court in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) the Court held that the existence of only one scheme to defraud does not automatically preclude the finding of a pattern under RICO. The Sixth Circuit recognized this holding in *H.J., Inc.* at page 7 of its opinion (Appendix at A7). However, at page 10 of its opinion (Appendix at A10), the Sixth Circuit appears to fall back to the multiple scheme test in stating that they "do not find that a defendant who engages in several different forms of fraud for a single purpose, to defraud a single victim through activities surrounding one construction project, without more, has engaged in more than one criminal scheme." This gives rise to the first question presented: Does the fact that predicate acts which take multiple forms intended to obtain various amounts to be paid at different times all relate to a single construction project prevent those predicate acts from constituting multiple schemes under RICO?

Turning to the RICO requirement of continuity, the Sixth Circuit then noted this Court's statement in *H.J., Inc.* that:

> "[P]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement. . . ." 492 U.S. at 242, 109 S. Ct. at 2902.

(Appendix at A10). In finding that the allegations in Vemco's complaint do not meet that continuity standard the Sixth Circuit apparently believed that this Court

would treat seventeen months as not over a few weeks or months. This Court should not give such an expansive definition to the word "few."

Further, and perhaps more importantly, in finding that the defendants' scheme extended over only seventeen months, the Sixth Circuit appears to have misread Vemco's allegations. Actually, Vemco had alleged that the predicate acts extended over a period exceeding four years, from May 1987 until July 1991. To reach that time it is necessary to count the period during which the Defendants withheld the blueprints for the project's electrical system. The Sixth Circuit refused to count this period stating at page 8 of its opinion that ". . . actions taken years later by a party to avoid a court judgment on RICO predicate acts, such as Flakt's alleged refusal to turn over the blueprints which the district court ordered Flakt to produce, have been held to be too unrelated and distinct to be part of a pattern along with the earlier predicate acts. *Apparel Art Int'l., Inc. v. Jacobson,* 967 F.2d 720, 724 (1st Cir. 1992)." (Appendix at A8). In *Apparel Art* the First Circuit, in an opinion written by then Chief Judge Breyer, refused to count as part of a pattern of racketeering the defendants' fraudulent conveyance designed to avoid a judgment which had been rendered against it in an arbitration proceeding long after the scheme had come to light. It is true that Vemco's amended complaint at ¶64 included allegations that the court in another proceeding had ordered the blueprints to be produced and that acts of withholding them were "undertaken corruptly and violated the court's order and were undertaken to and did impede, disrupt or interfere with the federal court proceedings." It is apparently this allegation that the Sixth Circuit likened to the fraudulent conveyance situation in *Apparel Art.* However, this overlooks

Vemco's further allegations in ¶66 that another purpose of withholding the documents was "to cause economic duress by causing Plaintiff to expend a significant amount of money to make the Vemco plant minimally functional" and was "in furtherance of Defendants' extortionate conduct in attempting to extract more money from the Plaintiff." Thus it is clear in this case that Vemco's allegations relate the withholding of the blueprints to a continuation of the Defendants' extortionate conduct against Vemco until July 1991, extending the pattern of racketeering to a period of over four years.

Actually, the Sixth Circuit did recognize that the Defendants' taking the plans and specifications for the project's electrical system made it impossible for Vemco to complete the project without great additional expense (Appendix at A3). They totally ignored, however, Vemco's allegations that withholding the plans and specifications constituted extortion and obstruction of justice. Therefore, the court implicitly concluded as a matter of law that oppressive conduct that violates a court order cannot constitute predicate acts for RICO.

The Sixth Circuit apparently read *Apparel Art* as instructing that, in spite of such allegations of extortion and obstruction of justice in pursuit of economic duress, if the act of withholding the documents was in violation of a court order, that fact alone should prevent it from constituting a racketeering act which would otherwise extend the duration of the pattern of racketeering. Thus, the Sixth Circuit's reading of *Apparel Art* gives rise to the second question presented: Does the fact that predicate acts were taken in violation of a court order immunize those acts from ever counting as part of a pattern of racketeering along with earlier predicate acts under RICO? We contend that the answer to this

question should be no and that the holding of the Sixth Circuit to the contrary is a misinterpretation of *Apparel Art* and should not be allowed to stand.

The principal issue in this case, then, is contained in the third question presented: May the actions of alleged racketeers involving a single victim and a single scheme for a single purpose over four years, ever constitute the type of conduct Congress sought to prohibit with RICO?

Though not identical to the facts in *H.J., Inc.*, the allegations of Vemco's complaint are sufficiently close so that *H.J., Inc.* should control this case. The only difference between the two cases is that the scheme in *H.J., Inc.* extended over six years as opposed to four years in *Vemco* and that *H.J., Inc.* involved a single class of victims where *Vemco* involved a single corporate victim.

Based on that similarity, *H.J., Inc.* should control this case resulting in this Court's allowance of the writ of certiorari and summary reversal of the decision of the Sixth Circuit.

II. As acknowledged by the Sixth Circuit in its opinion, its decision in this case conflicts with the earlier decision of the Second Circuit in *Procter & Gamble v. Big Apple Industrial Building, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied* 493 U.S. 1022, 110 S. Ct. 723, 107 L. Ed. 2d 743 (1990).

Just prior to announcement of this Court's decision in *H.J., Inc.* the Second Circuit announced its decision in *Procter & Gamble v. Big Apple Industrial Building, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied* 493 U.S. 1022, 110 S. Ct. 723, 107 L. Ed. 2d 743 (1990). While the allegations of Vemco's complaint are very close to the facts in *H.J.*,

Inc. they are virtually identical to those in *Procter & Gamble.* In *Procter & Gamble,* plaintiff, Procter & Gamble,[1] considered building a television production studio. According to the complaint, the defendants submitted a plan for construction at a price not to exceed $25 million, misrepresenting its expertise and its own projections that the project would cost significantly more than the quoted price. The plaintiff relied on the misrepresentations and entered into the construction project and guaranteed construction loans for the defendants. The plaintiff also made progress payments to or for the defendants, based upon allegedly false invoices supplied by the defendants. On these facts, the Second Circuit ruled that "it is clear that the plaintiffs alleged an adequate and colorable cause of action under RICO." 879 F.2d at 18. In a holding which foreshadowed *H.J., Inc.* the court rejected the argument that multiple schemes must be proven to state a claim under RICO. Instead, the court determined that the averment of a single scheme by a contractor to bilk his customer regarding one construction project, which is made up of five particular misrepresentations over a two-year period, alleges sufficient continuity to support a claim under RICO, §1962(c).

Recognizing that the facts in *Procter & Gamble* and the allegations in Vemco's complaint are indistinguishable, the Sixth Circuit in this case simply stated that they decline to adopt the reasoning of the Second Circuit in *Procter & Gamble* (Appendix at A10).

[1] While there were two plaintiffs in *Procter & Gamble,* Procter & Gamble was the only real victim. The other plaintiff was a creation of Procter & Gamble's advertising agency formed to act for Procter & Gamble and whose obligations Procter & Gamble guaranteed. The Sixth Circuit pointed to the fact *Procter & Gamble* was a single victim case in declining to adopt the Second Circuit's reasoning (Appendix at A10).

They offer two explanations. First, they refuse to find, as they say the Second Circuit did, that a defendant who engages in several different forms of fraud for a single purpose, to defraud a single victim through activities surrounding one construction project, without more, has engaged in more than one criminal scheme. Second, they find the Second Circuit's definition of continuity as meaning "that separate events occur over time and perhaps threaten to recur" over inclusive in light of this Court's subsequent discussion in *H.J., Inc.* (Appendix at A10). Thus the decisions in *Procter & Gamble* and this case now stand in opposition to each other.

In the court of appeals the defendants (now respondents) argued that the Second Circuit's decision in *Procter & Gamble* has not been frequently cited. Of course, that is readily explained by the fact that its basic holding was to reject the multiple scheme test which for most was put to rest by the immediately following decision of this Court in *H.J., Inc.* to the same effect.

Nevertheless, the Sixth Circuit in this case has now brought into question the Second Circuit's decision, leaving the state of the law unsettled on the subject of what constitutes the elements of a pattern of racketeering for RICO. The writ of certiorari in this case should be allowed in order to give this Court the opportunity to resolve this conflict between the Second and Sixth Circuits.

III. The decision of the Sixth Circuit in this case represents yet another attempt to lay down a barrier (the single victim barrier) to alleging a cause of action under RICO.

The history of RICO has been for lower courts to lay down barriers to alleging a cause of action under RICO not contained in the statute followed by this Court reversing those decisions, thus removing the barriers. This history provides a useful backdrop for considering the Sixth Circuit's reference to Vemco as a single victim in affirming the dismissal of its Count II under 18 U.S.C. §1962(c).

After some experience with the RICO statute, lower courts began to create barriers to stating a cause of action under the statute, apparently in an effort to stem the tide of such cases by narrowing the scope of RICO. After seeing this pattern developing, this Court considered two such barriers articulated by the Second Circuit. In *Sedima S.P.R.L. v. Imrex Corp.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) this Court struck down both of them. The first was the idea that a civil action under RICO could proceed only after a criminal conviction. As the Court noted, the word "conviction" does not appear in any relevant portion of the statute, 473 U.S. at 488. In fact, in that case, the Court found language that actually negated the idea of a prior conviction requirement.

The second barrier to a RICO action considered by the Court in *Sedima* was the Second Circuit's prerequisite for a civil action under 18 U.S.C. §1962(c) that there be a "racketeering injury" alleged, separate from the injury caused by the predicate acts themselves. In rejecting this prerequisite of a separate "racketeering injury" the Court observed that a reading of the statute belies any such requirement. 473 U.S. at 495.

Still, trial courts continued to create judicial limitations on the RICO statute, for example, inventing a barrier to RICO actions known as the multiple scheme test. Under this test an allegation of a single scheme would be insufficient to establish a pattern of racketeering activity under RICO. As observed in the first section of this petition, this Court struck that barrier down in *H.J., Inc. v. Northwestern Bell Telephone Co., supra.* In its holding, the Court again grounded its interpretation of RICO in the plain language of the statute, pointing out that the concept of scheme appears nowhere in the language of the act. This time the Court also noted the absence of such a concept in the legislative history. 492 U.S. at 239.

Recently, this Court had occasion to consider yet another barrier to stating a RICO cause of action. In *National Organization for Women, Inc. v. Scheidler,* _____ U.S. _____, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), the district court had dismissed a complaint seeking to state a RICO claim under §1962(c) on the grounds that it failed to allege a profit generating purpose. The Seventh Circuit affirmed, adopting the analysis of the Second Circuit in *United States v. Ivic,* 700 F.2d 51 (CA2, 1983) which had found an economic motive requirement implicit in the enterprise elements of an offense under RICO. In reviewing the Seventh Circuit decision this Court rejected that analysis. Thus once again this Court struck down a barrier to stating a cause of action under RICO, pointing out that nowhere in either §1962(c), or in the RICO definitions in §1961, is there any indication that an economic motive is required. 114 S. Ct. at 804.

In affirming the district court's dismissal of Count II of Vemco's complaint in this case, the Sixth Circuit did not isolate a single victim requirement as a barrier to a cause of action under RICO.[2] Instead it lumped its finding of a single victim together with its finding of a "single scheme for a single purpose." *Opinion* page 10. However, since the multiple scheme requirement had already been repudiated by this Court in *H.J., Inc.* the finding of a single victim must have been given very considerable, if not controlling, weight in the Sixth Circuit rejection of Vemco's RICO cause of action. Further, it is noted that the finding of a single victim by the Second Circuit in *Procter & Gamble v. Big Apple Industrial Building, Inc., supra,* was one of the principle factors in the Sixth Circuit's declining to adopt the Second Circuit's reasoning in deciding this case.

Accordingly, we now have the Second Circuit holding that allegations of a single victim are not a barrier to stating a cause of action under RICO and the Sixth Circuit holding otherwise. Thus this case is an ideal vehicle for this Court to determine once and for all whether a cause of action can be stated under RICO where the racketeers have *so far* attacked only one victim. We will contend that just as Congress created no requirement of multiple schemes, neither did it require that prosecution of civil actions under RICO be available only to the second and subsequent victims of multiple predicate acts such as mail fraud, wire fraud, extortion and obstruction of justice. Therefore, this writ of certiorari should be allowed to permit the Court to consider whether a cause of action under RICO requires an allegation of multiple victims.

[2] The Sixth Circuit made no mention of its prior holding in *Blue Cross and Blue Shield of Michigan v. Kamin,* 876 F.2d 543 (6th Cir. 1989) where it had refused to adopt a multiple victim requirement.

CONCLUSION

Because the decision of the Sixth Circuit in this case conflicts with the recent decision of this Court in *H.J., Inc. v. Northwestern Bell Telephone Co., supra,* this Court should allow the writ of certiorari requested here and grant summary reversal of the decision of the Sixth Circuit. In the event that the Court chooses not to grant summary reversal, the Court should nevertheless allow the writ in order to consider the questions presented. Those questions address matters of great national significance including a division between the Second and Sixth Circuits of the United States Court of Appeals as is more fully outlined above.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed April 29, 1994)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0132P (6th Cir.)
File Name: 94a0132p.06

No. 93-1412

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VEMCO, INC.,
Plaintiff-Appellant,

v.

JOHN CAMARDELLA, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed April 29, 1994

Before: KENNEDY and MILBURN, Circuit Judges; and ALDRICH, District Judge.*

ALDRICH, District Judge. The plaintiff filed this action in the district court alleging violations of 18 U.S.C. §1962(a) & (c) (RICO); conspiracy to commit fraud; and common law fraud. The defendants moved to dismiss the

*The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

complaint under Fed. R. Civ. P. 12(b)(6). The district court referred the motion to dismiss to the magistrate judge, for preparation of a report and recommendation. The district court subsequently adopted in its entirety the report and recommendation of the magistrate judge, and dismissed the counts under §1962(a) & (c), and the count for conspiracy to defraud, for the failure to state a claim. The district court dismissed without prejudice the pendant state law fraud claim.

Plaintiff-appellant Vemco appeals the dismissal of Counts I and II, the claims under §1962(a) & (c). Vemco does not appeal the dismissal of the conspiracy claim. We affirm the judgment of the district court.

I.

The allegations of Vemco's amended complaint, which we accept as true for the purposes of a motion to dismiss under Rule 12(b)(6), *see Scheuer v. Rhodes*, 416 U.S. 232, 235-37 (1974), are as follows.

Plaintiff-appellant Vemco, Inc. is a Michigan Corporation which manufactures and paints plastic automotive trim parts. In 1987, Vemco desired to build a new manufacturing facility which would include a "paint finishing system." On November 15, 1987, Vemco contracted with defendant-appellee Flakt, Inc., a Delaware corporation, to have Flakt build the paint finishing system for $15 million. At the time of the contract, defendant-appellee John Camardella was president of the division of Flakt which entered into the contract with Vemco; defendant-appellee Thomas Mark was the director of finance and business development of the division; and defendant-appellee Richard Aquino was vice president of sales for the division.

Vemco alleges that when negotiating the contract, Flakt knowingly misrepresented that it could build a system which would meet the specified system performance requirements for a total cost of $15 million dollars. Flakt guaranteed the system would be fully operational by

September, 1989. In December, 1987, Flakt also communicated by letter its allegedly fraudulent $15 million estimate to Vemco's lenders, inducing those lenders to fund the purchase price of the equipment and services Vemco bought from Flakt.

Various disputes arose over the project beginning in January, 1988. Flakt demanded that Vemco pay certain OCR charges, which Vemco believed Flakt was obligated to pay under the contract. Vemco was also dissatisfied with the progress of Flakt's work. In May, 1988, Flakt demanded payment of $2.8 million. Vemco alleges that it made that payment in reliance on Flakt's misrepresentations about how close the project was to completion. In July, 1988, Flakt demanded payment of an additional $4 million, and threatened litigation against Vemco and Vemco's lenders if the money was not paid.

Beginning in July, 1988, Flakt sent Vemco quarterly billing statements demanding that Vemco pay Flakt $6 million plus interest. In August, 1988, Flakt left the worksite and took with it the specifications for the project's electrical system, which made it impossible for Vemco to complete the project without great additional expense. Litigation began soon afterward. In September, 1988, the district court (in a separate action from this case) ordered Flakt to produce the plans to Vemco. Flakt failed to comply with the district court's order until July, 1991, when Flakt finally produced the documents. In December, 1988, Flakt allegedly threatened that it would run Vemco out of business if Vemco did not pay the money.

Vemco filed this RICO action in June, 1991.

II.

This Court reviews *de novo* the district court's dismissal of the amended complaint under Rule 12(b)(6). *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987). The complaint should not be dismissed under Rule 12(b)(6) unless it appears without a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

Vemco argues on appeal (1) that the district court erred in finding that Vemco had not sufficiently alleged an "investment injury" to state a claim under §1962(a) of RICO; and (2) that the district court erred in finding that Vemco had not alleged acts of sufficient "continuity" to constitute a pattern of racketeering activity under §1962(c) of RICO.

A. Dismissal of Count I: §1962(a)

Section 1962(a) of RICO provides in part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. §1962(a).

This Court has held that in order to state a claim under §1962(a), a plaintiff must plead a specific injury to the plaintiff caused by the investment of income into the racketeering enterprise, *distinct from* any injuries caused by the predicate acts of racketeering. *Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir. 1990) (dismissing §1962(a) claim when plaintiffs alleged "only injuries traceable to the alleged predicate acts"). This Circuit's pleading requirement of a so-called "investment injury" is consistent with the holdings in all but one of the circuits which have addressed the question. *See Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990); *Glessner v. Kenny*, 952 F.2d 702, 708-10 (3d Cir. 1991); *Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992); *Nugget Hydroelec. L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437-38 (9th Cir. 1992), *cert.*

denied, 113 S. Ct. 2336 (1993); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820, 110 S. Ct. 76 (1989); *Danielson v. Burnside-Ott Training Ctr.*, 941 F.2d 1220, 1239-40 (D.C. Cir. 1991); *but see Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836-40 (4th Cir. 1990).

> Here, Vemco did allege reinvestment of racketeering proceeds:
>
> [Defendants] received income derived directly . . . and . . . indirectly in the form of wages and, possibly other means, . . . from a pattern of racketeering activity as detailed above.
>
> Upon information and belief this income was used, directly or indirectly, in the operation of the enterprise [described above].

Amended Complaint ¶¶ 72-73. Nowhere in the amended complaint, however, did Vemco allege an injury stemming from the *investment*, distinct from injuries stemming from predicate acts. In fact, in a section of the amended complaint entitled "Injuries to Plaintiff," Vemco specifically alleged only a list of damages it suffered "[a]s a result of the Predicate Acts herein alleged which were part of a pattern of racketeering activity . . . ." Amended Complaint ¶68. Such allegations do not meet this Circuit's requirement of a distinct "investment injury."

Vemco's reliance on this Court's opinion in *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989), is misplaced. In *Newmyer*, this Court held that a district court had improperly dismissed for lack of an investment injury a §1962(a) claim involving an investment plan. The district court had reasoned that the plaintiffs could not be injured by what the defendants did with the plaintiffs' money after they gave it up. We disagreed, noting that the *Newmyer* plaintiffs could have been injured by the investment itself if the investment plan into which they put their money (i.e., the enterprise) was itself funded with monies from *prior* racketeering against *prior* victims. This Court thus reversed the dismissal of the complaint, since an

injury resulting from the investment of racketeering proceeds itself was possible.

Newmyer is distinguishable from the case at hand. Unlike the plaintiffs in *Newmyer*, Vemco does not allege that Flakt itself was built with racketeering proceeds amassed from others *prior* to Vemco's association with Flakt. Such an allegation would make Vemco's claim against Flakt analogous to that against the investment plan in *Newmyer*. Rather, Vemco alleges that the income Flakt derived from its racketeering *against Vemco* was *subsequently* used to operate the enterprise. Vemco never alleges that the reinvestment into the enterprise resulted in an injury separate from the "predicate acts" injuries.

The district court properly concluded that Vemco failed to plead an investment injury to state a claim under §1962(a). Therefore, we affirm the district court's dismissal of Count I of the amended complaint.

B. Dismissal of Count II: §1962(c)

Section 1962(c) of RICO provides in part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

18 U.S.C. §1962(c).

A plaintiff thus must plead sufficient facts to establish the existence of a "pattern" of racketeering activity. *See Sedima S.P.R.L. v. Imrex Corp.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985). A pattern requires at least two "predicate acts" of racketeering activity within ten years of each other. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-38, 109 S. Ct. 2893, 2900 (1989). A pattern is not automatically established, however, by a

large number of unrelated acts; the acts must be ordered and arranged so as to exhibit "relatedness" and "continuity." *Id.*, 492 U.S. at 238, 109 S. Ct. at 2900.

"Relatedness," that is, a relationship between or among the alleged predicate acts, is satisfied if the acts have "the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events." *Vild v. Visconsi*, 956 F.2d 560, 566 (6th Cir.), *cert. denied*, 113 S. Ct. 99 (1992).

The requirement of "continuity," or a threat of continuing criminal activity, ensures that RICO is limited to addressing Congress's primary concern in enacting the statute, i.e. long-term criminal conduct. *See H.J., Inc.*, 492 U.S. at 241-42, 109 S. Ct. at 2902. The Supreme Court has described continuity as either "closed-ended," referring to a closed period of repeated conduct extending over a substantial period of time, or "open-ended," referring to past conduct "which by its nature projects into the future with a threat of repetition." *Id.* When a lawsuit is brought before the plaintiff can show activity over a long period of time, the crucial showing is "whether the *threat* of continuity is demonstrated." *Id.* (emphasis in original).

The existence of only one scheme to defraud does not automatically preclude the finding of a pattern. *H.J., Inc.*, 492 U.S. at 240-41, 109 S. Ct. at 2901. However, the number of schemes is relevant to the inquiry. We agree with the Seventh Circuit that while "a single scheme cannot preclude the finding of a RICO pattern, we do believe it is significant when combined with other relevant factors in showing a lack of required 'continuity.'" *U.S. Textiles, Inc. v. Anheuser Busch Cos., Inc.*, 911 F.2d 1261, 1269 (7th Cir. 1990).

The district court found that Vemco did plead acts of sufficient "relatedness" to constitute a pattern. The court concluded, however, that the alleged conduct by Flakt did not demonstrate a sufficient threat of continuing racketeering activity to establish the required "continuity."

The court thus dismissed the §1962(c) claim for a failure to plead a pattern of racketeering activity.

Vemco argues that Flakt committed predicate acts of "fraud, extortion, and obstruction of justice spanning more than four years from May 1987 through at least July 1991." The district court correctly concluded, however, that not all of the events alleged by Vemco qualify as predicate acts under RICO. Flakt's conduct in sending out billing notices from 1991 through 1992 pursuant to an allegedly fraudulent contract cannot be cited by plaintiffs to extend the duration of the fraudulent scheme. *See Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1418 (3d Cir.), *cert. denied*, 111 S. Ct. 2839 (1991); *Feinstein v. RTC*, 942 F.2d 34, 36 (1st Cir. 1991). A threat of litigation if a party fails to fulfill even a fraudulent contract, moreover, does not constitute extortion. *American Nursing Care of Toledo, Inc. v. Leisure*, 609 F. Supp. 419, 430 (N.D. Ohio 1984); *see United States v. Enmons*, 410 U.S. 396, 400, 93 S. Ct. 1007, 1010 (1973). Finally, actions taken years later by a party to avoid a court judgment on RICO predicate acts, such as Flakt's alleged refusal to turn over the blueprints which the district court ordered Flakt to produce, have been held to be too unrelated and distinct to be part of a pattern along with the earlier predicate acts. *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 724 (1st Cir. 1992).

When these acts are disregarded, the alleged predicate acts span a time period only from July, 1987, when the fraudulent contract was negotiated, through December, 1988, when Flakt allegedly threatened it would "run Vemco out of business" unless Vemco paid Flakt millions of dollars -- a total of seventeen months. In addition, when the obstruction of justice allegation is disregarded, Vemco is left with allegations of fraud (in negotiating the contract; making representations to lenders; and reporting the status of the work) and one allegation of extortion (in threatening to run Vemco out of business). There is also only one victim.

We agree with the district court that the acts alleged are insufficient to show the "continuity" required for a pattern. Vemco has alleged a single fraudulent scheme by Flakt to misrepresent a guaranteed price in a building contract, and later to extort a higher price from Vemco. The total scheme, from the time of contract negotiations until the last threat alleged, lasted only seventeen months. The goal of the "single criminal episode," as the district court accurately characterized it, was to get Vemco to pay the cost of *one* paint system. There is no allegation that Flakt had any association with Vemco other than the allegedly fraudulent paint finishing system contract.

We find the fraudulent scheme at issue here similar to that in *Thompson v. Paasche*, 950 F.2d 306 (6th Cir. 1991). In *Thompson*, this Court found that a single scheme involving the fraudulent sale of nineteen lots of land did not have the requisite "continuity" to state a claim under RICO. We stated:

> Paasche's fraudulent scheme was an inherently short-term affair. He had nineteen lots to sell. Once he had sold all of the lots, the scheme was over. It had to be, he had no more land to sell. Thus, his scheme was, by its very nature, insufficiently protracted to qualify as a RICO violation.

Id. at 311. Here, Flakt has fewer victims than the defendant in *Thompson*. Flakt's instrumentality is not a finite piece of land, but rather a single construction job. There are no facts pleaded suggesting anything but that once Flakt received the money it was requesting in the billing statements, its scheme would be over, and it would end its association with Vemco. Moreover, there is no allegation that Flakt engaged in similar practices on other contracts involving other parties. As in *Thompson*, "there is no indication of any continuing opportunity or scheme" to extort additional monies from Vemco or anyone else, on this or other contracts. *See id.*

Vemco urges us to adopt instead the conclusion of the Second Circuit in a case similar on its facts, *Procter &*

Gamble v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10 (2d Cir. 1990). The *Procter & Gamble* plaintiff alleged predicate acts of fraud lasting over two years, surrounding the construction and leasing of a studio complex, including fraudulently inducing the plaintiff to enter a lease for the project, inducing plaintiffs to guarantee financing for the project, diverting escrow funds, and fraudulently collecting "interim rents" for delays caused by the defendants. The court concluded that the plaintiff had alleged "five separate schemes" relating to the single construction project and single victim, and found that the plaintiff had satisfied the continuity requirement.

We decline to adopt the reasoning of the Second Circuit in *Procter & Gamble*. We do not find that a defendant who engages in several different forms of fraud for a single purpose, to defraud a single victim through activities surrounding one construction project, without more, has engaged in more than one criminal scheme. Moreover, we find the Second Circuit's definition of continuity as meaning "that separate events occur over time and perhaps threaten to recur," 879 F.2d at 17, overinclusive in light of the Supreme Court's subsequent discussion in *H.J. Inc.*. As the Court noted in *H.J. Inc.*, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement . . . ." 492 U.S. at 242, 109 S. Ct. at 2902. The allegations in Vemco's complaint simply do not meet *H.J. Inc.*'s continuity standard.

Vemco has failed to establish either "closed-ended continuity," a closed period of repeated conduct over a substantial period of time, or "open-ended continuity," conduct projecting into the future with a threat of repetition. We cannot conclude that Flakt's alleged actions here, involving a single victim and a single scheme for a single purpose over seventeen months, constitute the type of "long-term criminal conduct" Congress sought to prohibit with RICO. *See H.J. Inc.*, 492 U.S. at 241-42, 109 S. Ct. at 2902. The district court's dismissal of the §1962(c) claim for a failure to plead facts establishing the

requisite "pattern" of racketeering activity under RICO was thus proper.

III.

For the foregoing reasons, the dismissal of Counts I and II of the plaintiff's amended complaint is AFFIRMED.

AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION—FLINT

(Filed February 8, 1993)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION—FLINT

Case No. 91-CV-40256-FL

HON. STEWART A. NEWBLATT
HON. MARC L. GOLDMAN

VEMCO, INC., a Michigan Corp.,
Plaintiff,

v.

JOHN CAMARDELLA, THOMAS E. MARK, RICK AQUINO, JOHN DOE(s) and FLAKT, INC., a Delaware Corp.,
Defendants.

AMENDED JUDGMENT

This action came on for hearing before the Court, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that Plaintiff's claims under 18 U.S.C. §1962(a), §1962(c) and §1962 are hereby DISMISSED. IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's conspiracy to defraud claim be and hereby is

DISMISSED. IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's state fraud claim be and hereby is DISMISSED without prejudice.

JOHN P. MAYER, *Clerk*
By: /s/ RUTH A. JOZWIAK
Ruth A. Jozwiak
Courtroom Deputy Clerk

Dated: February 8, 1993
Flint, Michigan

2917/31/pleadings/AmendJudg

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION—FLINT

(Filed January 19, 1993)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION—FLINT

CIVIL NO.: 91-CV-40256-FL

HON. STEWART A. NEWBLATT
HON. MARC L. GOLDMAN

VEMCO, INC., a Michigan Corp.,
Plaintiff,

v.

JOHN CAMARDELLA, THOMAS E. MARK, RICHARD AQUINO, JOHN DOE(s) and FLAKT, INC., a Delaware Corp.,
Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that Plaintiff's claims under 18 U.S.C. §1962(a) and §1962(c) are hereby DISMISSED. IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's conspiracy to defraud claim be and hereby is DISMISSED.

JOHN P. MAYER, *Clerk*
By: /s/ RUTH A. JOZWIAK
Ruth A. Jozwiak
Courtroom Deputy Clerk

Dated: 1/19/93
Flint, Michigan

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION—FLINT

(Filed January 19, 1993)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION—FLINT

CIVIL NO.: 91-CV-40256-FL

HON. STEWART A. NEWBLATT
HON. MARC L. GOLDMAN

VEMCO, INC., a Michigan Corp.,
Plaintiff,

v.

JOHN CAMARDELLA, THOMAS E. MARK, RICHARD AQUINO, JOHN DOE(s) and FLAKT, INC., a Delaware Corp.,
Defendants.

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court having reviewed the Magistrate Judge's Report and Recommendation, filed on September 17, 1992, as well as any objections filed thereto,

IT IS ORDERED that the Report is accepted and entered as the findings and conclusions of this Court.

/s/ STEWART A. NEWBLATT 1/19/93
Stewart A. Newblatt
United States District Judge

Dated: 1/19/93

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION—FLINT

(Filed September 17, 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION—FLINT

CIVIL NO.: 91-CV-40256-FL

HON. STEWART A. NEWBLATT
HON. MARC L. GOLDMAN

VEMCO, INC., a Michigan Corp.,
Plaintiff,

v.

JOHN CAMARDELLA, THOMAS E. MARK, RICHARD AQUINO, JOHN DOE(s) and FLAKT, INC., a Delaware Corp.,
Defendants.

REPORT AND RECOMMENDATION

This is an action brought pursuant to the Racketeer Influenced and Corrupt Organization Act [RICO], 18 U.S.C. §1962 *et. seq.*[1] Also alleged are state common law claims of fraud and conspiracy to defraud. Plaintiff

[1] A complaint was originally filed on June 3, 1991 naming two plaintiffs and ten defendants. On January 22, 1992, plaintiff Vemco amended the complaint identifying only itself as a plaintiff and the defendants identified above.

Vemco, Inc. is a Michigan corporation engaged in the manufacturing and painting of trim parts for the automotive industry. Defendant Flakt, Inc.[2] is a Delaware corporation with a principal place of business in Georgia. Its Alpha Division is engaged in the business of building and selling paint finishing systems. Defendant John Camardella is currently the president of Flakt. At the time of the events giving rise to this lawsuit, he was president of the Alpha Division. Defendant Thomas Mark was the director of finance and business development for the Alpha Division of Flakt. Defendant Richard Aquino was vice-president of sales of the Alpha Division of Flakt.

This case arises out of an agreement entered into on November 15, 1987 between Vemco and Flakt by which Flakt was to design and construct a paint finishing system for use by Vemco.[3] Plaintiff claims that Flakt guaranteed a total maximum cost of Fifteen Million Dollars [$15,000,000.00] for the project, including all materials as well as consulting, management and engineering fees. Defendants characterize the agreement as a cost-plus agreement which included the paint system, but did not account for change orders and additional consulting fees resulting from the changes. The system was required to be completed by September, 1988.

Disputes initially arose between Flakt and Vemco in January, 1988. Vemco was dissatisfied with the manner in which the system was being constructed. Flakt was

[2] Flakt, Inc. [now known as ABB-Flakt, Inc.] was a subsidiary of Flakt, A.B., a Swedish company. Bjorn Stigson, whose name is frequently mentioned in the complaint, is president of Flakt, A.B.

[3] The agreement entered into on November 15, 1987 apparently incorporated a number of studies and proposals prepared by Flakt for Vemco and superseded an interim agreement entered into between the parties in July, 1987. The contract was back-dated to July, 1987.

dissatisfied with Vemco's failure to timely make its payments. Nonetheless, the project continued. Various change-orders were signed by Vemco representatives which Vemco believed they would not be charged for. However, Flakt billed Vemco for these changes, the result being that the project cost exceeded Fifteen Million Dollars [$15,000,000.00].

In June, 1988, Flakt demanded a payment of Two Million Eight Hundred Sixty Eight Thousand Seven Hundred Ninety One Dollars and Two Cents [$2,868,791.02] from Vemco. In return, it promised Vemco that the system would be ready for testing by the end of June, 1988. On June 3, 1988, following a meeting among principals of both corporations, a modification to the agreement was prepared and Vemco paid the money demanded. Although at the end of June Flakt represented that the system was complete, Vemco found the system to be defective. Disputes then arose over the quality and adequacy of the finished product, as well as over additional monies claimed by Flakt allegedly due to cost over-runs resulting from changes ordered by Vemco. Flakt left the worksite on August 5, 1988 and did not return.

Litigation began almost immediately. On September 8, 1988, Vemco brought an action in this court requesting an injunction requiring Flakt to turn over all blueprints, specifications and operation manuals for the paint system. That request was granted by United States District Judge Stewart A. Newblatt. Subsequently, in 1991, Vemco alleged that Flakt had withheld certain documents, including "as-built" blueprints, that the court had ordered delivered in its 1988 injunction. That issue is the subject of a pending contempt proceeding before the district judge.

In June, 1991, Vemco filed this RICO action. In response, Flakt filed a motion to dismiss. At oral argument on that motion, Vemco, at the court's direction, agreed to file an amended complaint. This amended complaint alleges RICO violations under 18 U.S.C. §1962(a), 1962(c) and 1962(d)[4], as well as a state common law conspiracy and fraud claims. Defendants contend that dismissal is warranted pursuant to F.R.Civ.P. 12(b)(6) because plaintiff has failed to state causes of action upon which relief can be granted, under either the RICO or state claims.

Upon a motion to dismiss for failure to state a claim, all allegations in the complaint are to be accepted as true and construed in favor of the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *United States v. Mississippi,* 380 U.S. 128,143 (1965). The court's inquiry is limited to whether or nor the challenged pleadings set forth allegations sufficient to make out the elements of a right to relief. *Windsor v. The Tennessean,* 719 F.2d 155,158 (6th Cir. 1983), *cert. denied* 469 U.S. 826, 105 S.Ct. 105 (1984); *Great Lakes Steel v. Deggendorf,* 716 F.2d 1101,1105 (6th Cir. 1983). The complaint should not be dismissed unless it appears without doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41 (1957); *Lee v. Western Reserve Psychiatric Habilitation Center,* 747 F.2d 1062,1065 (6th Cir. 1984).

18 U.S.C. §1962(a)

Count I of the complaint alleges a cause of action under 18 U.S.C. §1962(a). This provision provides, in pertinent part:

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[4] At a hearing held on September 15, 1992, Vemco voluntarily withdrew its RICO conspiracy claim under §1962(d).

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The complaint alleges that the corporate defendant, Flakt, received income [the June 3, 1988 payment of $2,868,791.02] directly and the individual defendants received payments indirectly, in the form of wages and "possibly other means" from a pattern of racketeering activity.

This claim is clearly subject to dismissal. Under 18 U.S.C. §1962(a), a plaintiff must allege injuries *stemming* directly from the defendant's alleged use or investment of illegally obtained income. There must be a separate and traceable injury and a claim under §1962(a) may not be based upon injuries traceable to the predicate acts. *Craighead v. E. F. Hutton,* 899 F.2d 485,494 (6th Cir. 1990); *Glessner v. Kenny,* 952 F.2d 702,708 (3d Cir. 1991); *Banks v. Wolk,* 918 F.2d 418,421 (3d Cir. 1991); *Danielson v. Burnside-Ott Training Center,* 941 F.2d 1220,1239-40 (D.C.Cir. 1991). The mere fact that racketeering profits may have been reinvested in the business, thus enabling further fraud, is insufficient to state a claim under §1962(a). A plaintiff must specifically allege that he was injured by the use or investment of the money. *Glessner,* 952 F.2d at 709; *Kehr Packages v. Fidelcor, Inc.,* 926 F.2d 1406 (3d Cir. 1990); *Casper v. Paine Webber Group, Inc.,* 787 F.Supp. 1480,1491 (D.N.J. 1992).

Here, there is no allegation nor any evidence of any injury to plaintiff stemming from the defendants' use or investment of illegally obtained income. To the contrary, the complaint specifically states that the damages suffered by defendants are traceable to the predicate acts, rather than any separate investment injury. Accordingly, plaintiff has failed to state a cause of action under §1962(a) and that claim must be dismissed.

18 U.S.C. §1962(c)

18 U.S.C. §1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

Under this provision, a person [defendant] is liable under this section upon a showing that he engaged in "(1) conduct (2) of an enterprise (3) through a pattern 4) of racketeering activity." *Sedima S.P.R.L. v. Imrex Corp.*, 473 U.S. 479,496 (1985). Each of the terms used in this definition has a special meaning under RICO. A person is defined as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. §1961(3). An enterprise is defined as "any individual partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). Racketeering activity consists of criminal acts violating certain state laws and federal statutes delineated in 18 U.S.C. §1961(1). Included in this list, are violations of the federal mail and wire fraud statutes, 18 U.S.C. §§1341,1343, obstruction of justice, 18 U.S.C.

§1503, and state extortion laws. In order to constitute a pattern of racketeering activity, there must have been two acts of racketeering activity within ten years of each other. In addition, the predicate acts must be related and must amount to or threaten the likelihood of continued criminal activity. *H. J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 109 S.Ct. 2893,2900 (1989).

In this case, plaintiff has named Flakt, Inc., as well as three of its officers, as the defendants, i.e., the "persons" potentially liable under the statute. The enterprise through which they allegedly conducted through a pattern of racketeering activity is defined alternatively as 1) Flakt, Inc. 2) an association in fact consisting of defendant Flakt, along with Dennis Monahan, counsel for Flakt, Inc. in this case, and Bjorn Stigson, the president of the Swedish parent company, Flakt, A.B., and finally 3) an association in fact consisting of Stigson and Monahan, as well as defendants Camardella, Mark and Aquino.[5]

The predicate acts alleged by plaintiff as comprising the racketeering activity include mail fraud, 18 U.S.C. §1341; wire fraud, 18 U.S.C. §1343; obstruction of justice, 18 U.S.C. §1503; and extortion under Michigan law, MCL 750.213.

As noted earlier, the crux of plaintiff's claim is that defendants defrauded it by misrepresenting the actual cost of the painting system and by securing payments from defendants under false promises of timely completion of the system. As part of the scheme to defraud, plaintiff asserts that the defendants utilized the mails and wires in order to convey their

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[5] In one pleading, plaintiff also claims that perhaps an enterprise could be found consisting of Flakt, Inc. and Flakt, A.B.

misrepresentations to plaintiff. They further assert that the mails were used to misinform plaintiff's lenders concerning the overall cost of the project. It is also alleged that the mail and wires were used to convey falsified lien waivers and fraudulent change orders and that the wires were used to transfer monies from plaintiff to Flakt. Finally, plaintiff claims that defendants used the mails to send it monthly billing statements from November 30, 1987 through January 31, 1992 which perpetuated the fraud.

Plaintiff's allegations of extortion under MCL 750.213 involve two threats alleged by the defendants at meetings held to resolve the disputes. These threats, one on July 1, 1988 and the other on December 31, 1988, demanded payment and threatened expensive and time-consuming litigation if payment was not made. It is alleged that defendants threatened that the litigation would financially ruin plaintiff. Also alleged as extortive acts are the monthly billings sent to plaintiff by Flakt referred to above.

The allegation of obstruction of justice involves the failure to provide the "as-built" blueprints as directed by the court order. Plaintiff claims that the defendants, as well as attorney Monahan, deliberatly withheld these documents.

In their motion to dismiss, defendants allege that plaintiff has failed to state a claim against them under §1962(c). They assert that plaintiff has failed to adequately allege 1) a pattern of racketeering activity within the meaning of RICO and 2) the existence of an enterprise within the meaning of RICO. They further claim that plaintiff has failed to state the allegations of fraud with the particularity required by F.R.Civ.P. 9. Because I find that plaintiff has failed to allege a pattern of racketeering under RICO, I will only address at issue.

LACK OF A PATTERN

The courts have strained to arrive at a real definition of "a pattern of racketeering activity." *Apparel Art Intl., Inc. v. Jacobson,* 967 F.2d 720,722 (1st Cir. 1992). While §1961(5) states that a pattern requires the commission of at least two predicate acts, that alone is not sufficient to constitute a pattern of racketeering activity. *H. J., Inc. v. Northwestern Bell Telephone Co.,* 109 S.Ct. at 2899; *Thompson v. Paasche,* 950 F.2d 306,310 (6th Cir. 1991). Rather, in order to establish a "pattern" of racketeering activity, there must exist both "continuity;" that is "a threat of continuing criminal activity" as well as a "relationship" among the alleged predicate acts. *H.J., Inc.,* 109 S.Ct. at 2900; *Thompson,* 950 F.2d at 310; *Vild v. Visconi,* 956 F.2d 560,565-66 (6th Cir. 1992).

Continuity has been examined primarily in temporal terms. Two types of patterns have been identified in the context of continuity. These patterns have been delineated as the closed-ended and open-ended patterns. The former refers "to a closed period of repeated conduct." The latter refers "to past conduct that by its nature projects into the future with the threat of repetition." *H.J.,* 109 S.Ct. at 2902; *Thompson,* 950 F.2d at 310.

In this case, as will be seen, we are clearly dealing with an alleged closed period of conduct. The allegations against the defendants relate to alleged fraudulent and extortionate activity over a finite period of time. Indeed, the relationship between the parties was of a limited duration and there is no allegation that the defendants, a large American subsidiary of an even larger international corporation and its officers, would continue the alleged racketeering activity into the future.

In *H.J.*, the court attempted to define the nature of a closed period of conduct in a manner to conform with the intent of Congress in enacting RICO. The court stated:

> . . . a party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Congress was concerned in RICO with longterm criminal conduct.

H.J., 109 S.Ct. at 2902; *Thompson*, 950 F.2d at 310-11.

The concept of relationship among the predicate acts in the RICO concept of *pattern* once thought to be the more well-delineated aspect of the pattern definition, has recently come under more rigid scrutiny. This is because the relatedness aspect of a pattern overlaps to some extent with the continuity aspect. Moreover, the courts have recently begun attempting to define the relatedness concept in terms of an overall pattern of activity.

The Sixth Circuit has recently concluded that it is necessary to evaluate the relationship component of the pattern before examining the continuity component. *Vild v. Visconi*, 956 F.2d at 566. The relationship test can be satisfied if the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Vild*, 956 F.2d at 566, quoting *H.J.*, 109 S.Ct. at 2901.[6]

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[6] *Vild* is an interesting case in that the court found that the predicate acts alleged to show a pattern arose from two entirely different sets of conduct, one directed toward plaintiff, the other not so directed. The court concluded that these two sets of conduct could not be used to establish a pattern, even though the nature of the predicate acts

(Footnote continued on following page.)

Here, it would seem that the alleged predicate acts are clearly *related* for purposes of establishing a pattern. The allegations of conduct constituting mail fraud all involve the claim that the defendants intended to defraud plaintiff in the building of the paint system. It further involves the same participants, victims, and methods of commission. Similarly, the alleged acts of extortion and obstruction of justice can also be said to be related to the overall conduct vis-a-vis this plaintiff. Accordingly, because the predicate acts involve a common purpose, common participants, a common victim, and are seemingly interrelated, I conclude that the relatedness aspect of the pattern requirement has been satisfied. *See Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406,1412 (3d Cir. 1991); *Mylan Laboratories, Inc. v. Akzo N.V.*, 770 F.Supp. 1053,1076 (D.Md. 1991).

On the other hand, I do not believe that plaintiff has satisfied the continuity component necessary to establish a pattern of racketeering activity. This is so because when one examines the alleged fraudulent scheme and the predicate acts associated with the scheme, one merely finds a unified scheme of limited duration with no threat of continuity.

Based upon the complaint, the RICO case statement and plaintiff's listing of predicate acts, it is clear that the alleged scheme to defraud began, at the earliest, in July, 1987 when the defendants allegedly misrepresented to

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(Footnote continued from preceding page.)

might coincide. The court found the two sets of conduct to be unrelated and further found that because they were unrelated, they could not be considered together to establish the continuity aspect of the pattern requirement. The court examined each set of racketeering activity separately and determined that it was not of such continuity to constitute a pattern. The court took care to recognize, however, that one "scheme" may be adequate to constitute a pattern of racketeering activity.

plaintiff that the total cost of the system would not exceed Fifteen Million Dollars [$15,000,000.00]. The alleged predicate acts of mail and wire fraud allegedly began in July, 1987 when a draft of the agreement, allegedly misrepresenting the total project cost, was mailed from Flakt to Vemco. Based upon this misrepresentation, it is alleged that Kidder Peabody, on Vemco's behalf, telephoned potential investors in order to secure financing. Other predicate acts of wire and mail fraud are said to have occurred in December, 1987 when Vemco circulated a Flakt "price guarantee"[7] to its potential lenders. Plaintiff next alleges that wire transfers of payments from Vemco to Flakt were made in December, 1987 and February, 1988 in reliance of the misrepresentation.

Plaintiff asserts a second series of fraudulent activity involving order change requests and asserts predicate acts of mail fraud for mailed billings arising from those requests between January and July, 1988. Plaintiff alleges a third area of fraudulent activity involving the inducement of the June 3, 1988 payment of Two Million Eight Hundred Sixty Eight Thousand Seven Hundred Ninety One Dollars and Two Cents [$2,868,791.02]. Plaintiff refers to five mailings, wire transfers, and faxes between May 27, 1988 and July 25, 1988 relating to this fraudulent inducement. Plaintiff next asserts two acts of extortion, one threatening the ruin of plaintiff's business through litigation over the dispute, and the other, a wrongful demand for payment in December, 1988. Finally, plaintiff asserts the obstruction of justice based upon the failure to produce all of the system plans as ordered by the court in September, 1988.

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[7] Vemco insisted that Flakt write a letter guaranteeing a Fifteen Million Dollar cap on the system to be circulated to potential investors.

As noted, the concept of continuity in the definition of a "pattern" is one which the courts have found difficult to apply. In *Apparel Art Intl.*, the court undertook to resolve the issue of what constitutes a "pattern" without utilizing a formulaic analysis. 967 F.2d at 723. Recognizing the Supreme Court's admonition in *H.J.* that predicate acts revolving around one scheme may be sufficient to be a pattern, the court deliberately chose to employ the term "*episode*" to describe a single crime or event which would not be considered a pattern. As an example, they noted that even if a criminal episode consisted of various acts constituting separate crimes, it would still be insufficient to make out a pattern, as it would be contrary to RICO's basic purpose. Thus, to constitute a pattern under RICO, the parts of a single episode must pose a threat of continuing criminal activity.

Additionally, the courts have held that even if it can be shown that there were more than one criminal episode over time, that still may not be enough to show a pattern of racketeering activity. If the separate episodes involve different victims, methods, purposes, and participants, there would not be the requisite racketeering relationships to constitute a pattern. *Id.* at 723. *See also, Vild v. Visconi,* 956 F.2d at 566-67.

Under this analysis, I cannot find that plaintiff has stated a claim of a RICO pattern. The events giving rise to plaintiff's claim involve one criminal episode. It is predicated solely upon the alleged fraudulent scheme involving construction of the painting system. Moreover, the scheme appears to have lasted at most from July, 1987, when defendants first allegedly informed plaintiff that the project would cost no more than Fifteen Millions Dollars, through August, 1988, when the

negotiations between the parties over the dispute broke down and litigation began.[8] Accepting plaintiff's allegations of mail fraud, extortion, and obstruction of justice as true, the episode lasted no more than thirteen months. Where, as here, there is but a single scheme,[9] a single victim, and a single transaction, as well as no threat of future criminal conduct, and no evidence that defendant ordinarily conducts its business in a fraudulent manner, it cannot be said that plaintiff has sufficiently alleged a pattern of racketeering activity. *Apparel Art Intl.*, 967 F.2d at 723; *J. D. Marshall v. Redstart, Inc.*, 935 F.2d 815,820-21 (7th Cir. 1991) [thirteen months a relatively short period of time]. At most, this was, and is, a commercial dispute in which there may have been fraud. The allegations do not establish a pattern of racketeering activity.[10]

Plaintiff alleges that defendants' conduct in continuing to send it monthly billing statements through 1992 and failing to comply with the court's injunction through 1991 are predicate acts of mail fraud, extortion and obstruction of justice which demonstrate the

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[8] Litigation began in September, 1988.

[9] Again, I do recognize that a single scheme may constitute a pattern of racketeering activity. *H.J.*, 109 S.Ct. at 2899. However, the existence of multiple schemes and victims is highly relevant to the continuity of a defendants' conduct. *Id.* at 2901.

[10] I am aware that the Second Circuit has reached a contrary conclusion in a case in which the facts are similar to those presented here. *Proctor & Gamble v. Big Apple Indus. Bldgs., Inc.*, 879 F.2d 10 (2d Cir. 1989). I choose not to follow *Proctor & Gamble* for a number of reasons. First, it was decided before the Supreme Court's decision in *H.J.* Second, the facts are slightly different in that the alleged scheme lasted over two years. Most importantly, however, I disagree with the court's conclusion that the commission of a number of predicate acts in relation to the same criminal episode in the absence of any other evidence, is sufficient to establish continuity. I believe that the approach of the First and Third Circuits is more in line with the purpose of RICO.

continuity required to constitute a pattern of racketeering activity. These arguments are without merit. First, the mere sending of billing notices is neither fraudulent nor extortive behavior. In rejecting a claim identical to that put forward here, the First Circuit has stated:

> We regard as mere buzznackery plaintiff's efforts to suggest a lengthened period of involvement . . . by reliance on billing notices from, as well as checks to, the lender from 1989 to 1990.

Feinstein v. Resolution Trust Corporation, 942 F.2d 34,46 (1st Cir. 1991). The monthly billings are essentially innocent mailings which should not be considered in determining the duration of the scheme. *Kehr Packages,* 926 F.2d at 1418.

Similarly, the allegations of extortive threats (i.e., threatening litigation which will financially ruin the company) and obstruction of justice (the failure to turn over the papers as directed by the court) do not serve to create a pattern of racketeering activity sufficient to satisfy RICO. They may not even amount to predicate acts. A threat of litigation and a description of the ramifications of litigation is not extortive behavior under 18 U.S.C. §1961 or MCL 750.213 and may not be deemed a predicate act under RICO. *American Nursing Care of Toledo v. Leisure,* 609 F.Supp. 419,430 (N.D.Oh 1984); 18 U.S.C. §1950; *United States v. Emmons,* 410 U.S. 396,400 (1973). Indeed, the threat to take action which one is legally entitled to take cannot be deemed extortionate conduct.

Finally, even if plaintiff's allegations concerning the defendants' failure to turn over documents ordered by the district judge are true and assuming that this conduct violates 18 U.S.C. §1503, such conduct would not result in a finding of the continuity necessary to

amount to a pattern of racketeering activity. For example, in *Apparel Art Intl.*, once the defendant's fraudulent conduct became known, it conveyed its assets to other owners, intending to put them beyond reach of the plaintiff. The court concluded that this conduct could not be deemed, with the other alleged activity, to constitute a pattern of racketeering. The court found that such conduct, almost two years after commencement of the suit, was too unrelated, separate, and distinct to be considered as part of a racketeering pattern. Moreover, the court found that the object of the conduct was related to the effort to avoid a court judgment, rather than to perpetrate a fraud. *Id.* at 725.

The same rationale is applicable to this case. Assuming, for the moment, that the defendants purposely withheld operating documents for the paint system, the isolated instance constituting an obstruction of justice is simply too distinct and unrelated to the allegation of fraud to be considered part of a racketeering pattern. Moreover, being an isolated instance of conduct, it too fails to amount to or pose a threat of the kind of continuing criminal activity that RICO was designed to prevent.

In sum, although the alleged racketeering activity lasted almost thirteen months, it clearly was relatively short-lived. *J. D. Marshall*, 935 F.2d at 820. Moreover, it involved only one contract and was directed solely at one plaintiff. The predicate acts alleged here may "appropriately be characterized as separate parts of a single criminal episode." *Apparel Art Intl.*, 967 F.2d at 723. Finally, there is absolutely no indication that this conduct demonstrates the defendants' regular way of doing business or that the fraudulent activities are likely to continue. Accordingly, I cannot conclude that the complaint alleges the degree of continuity necessary to

comprise a pattern of racketeering activity. Plaintiff has therefore failed to assert a claim under 18 U.S.C. §1962(c) and that cause of action must be dismissed.

STATE COMMON LAW FRAUD AND CONSPIRACY CLAIMS

Fraud

Defendants also assert that plaintiff has failed to assert its common law fraud claim with the requisite specificity required by F.R.Civ.P. 9(b). Under Michigan law, in order to assert a claim for fraud, a plaintiff must allege that 1) the defendant made a material representation, 2) that the representation was false, 3) that when made the defendant knew the representation was false or made it recklessly, 4) that the defendant made the representation with the intent that it be acted upon by plaintiff, 5) that the plaintiff relied upon the misrepresentation and, 6) that the defendant suffered injury. *United States Fidelity v. Black,* 412 Mich. 99 (1981).

In this case, there can be no doubt that plaintiff has adequately plead a fraud claim with the requisite particularity. Plaintiff asserts that the defendants knowingly misrepresented the total cost of the paint system and that it relied on the misrepresentation to its detriment. Nothing more is required. Defendants' motion to dismiss the fraud claim should therefore be denied.[11]

[11] As I have recommended that all federal claims be dismissed, pendent jurisdiction would not exist for the fraud claim. *See Vild,* 956 F.2d at 570. However, it is unclear whether diversity may exist between the plaintiff and the individual defendants. *See* 28 U.S.C. §1332. If there is complete diversity between plaintiff and defendants, this court must retain jurisdiction. *Vild,* 956 F.2d at 570. Otherwise, it is subject to dismissal. The individual defendants are therefore directed to the affidavits, within ten days of this date, informing the court of the states in which they claim citizenship.

Conspiracy

In Count V of the amended complaint, plaintiff alleges that the four defendants conspired to defraud the plaintiff. As noted, the defendants are a corporation and three of its officers. It is a well-settled principle that a corporation and its employees are considered a single entity and are not capable of engaging in a conspiracy. *Doherty v. AMC,* 728 F.2d 334,339 (6th Cir. 1984); *Nieto v. United Auto Workers,* 672 F.Supp. 987,992 (E.D.Mi. 1987); *Schroeder v. Dayton-Hudson Corp.,* 448 F.Supp. 910,915 (E.D.Mi. 1977). Accordingly, the conspiracy claim must be dismissed.

SUMMARY

For the reasons stated above, I conclude that plaintiff's claims under 18 U.S.C. §1962(a) and §1962(c) must be dismissed for failure to state a claim upon which relief may be granted. I further conclude that plaintiff's conspiracy to defraud claim must also be dismissed. Plaintiff has adequately placed a common law fraud claim which survives defendants' 12(b)(6) motion, but which, as noted, may be subject to dismissal in the absence of complete diversity.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may

constitute a waiver of any further right of appeal to the United States Court of Appeals. *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

/s/ MARC L. GOLDMAN
Marc L. Goldman
United States Magistrate Judge

Date: September 17, 1992

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 7, 1994)

No. 93-1412

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VENTURE INDUSTRIES CORPORATION, *ET AL.*,
Plaintiffs,

VEMCO, INC.,
Plaintiff-Appellant,

v.

JOHN CAMARDELLA, *ET AL.*,
Defendants-Appellees,

DANIEL D. BURNARD, *ET AL.*,
Defendants.

ORDER

BEFORE: KENNEDY and MILBURN, *Circuit Judges;* and ALDRICH,* *Circuit Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having

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* Hon. Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN (pe)
Leonard Green, *Clerk*

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

No. 94-619

In The Supreme Court of the United States

October Term, 1994

VEMCO, INC.,

Petitioner,

vs.

JOHN CAMARDELLA, THOMAS E. MARK, RICHARD AQUINO, JOHN DOE(S) and FLAKT, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 7, 1994

QUESTION PRESENTED FOR REVIEW IF PETITION FOR WRIT OF CERTIORARI WERE GRANTED

Were this Court to grant petitioner's Petition For A Writ Of Certiorari only one question would be presented for review: Do the facts alleged by the petitioner in its Amended Complaint satisfy the "continuity" component of a RICO "pattern" of racketeering activity under 18 U.S.C. §1962(c)?

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STATEMENT OF THE CASE

This action involves a dispute over contracts under which the defendant-respondent Flakt, Inc. ("Flakt") agreed to install a paint finishing system in a plant operated by the plaintiff-petitioner Vemco, Inc. ("Vemco").[1/] Flakt contended that it had agreed to "cap" at $15 million the cost of the system *as described in a May 14, 1987 study*. Vemco contended that the $15 million was to cover the system *as actually installed*, including the cost of Owner's Change Requests ("OCRs"). Vemco also contended that the system installed by Flakt was unsatisfactory and that Flakt had not finished the system in a timely manner.

Vemco brought two lawsuits. The first lawsuit sought to require arbitration of the contract disputes and to require Flakt to turn over certain documentation to Vemco; the second lawsuit was this RICO action. In this RICO action, Vemco alleged that Flakt and certain Flakt officers engaged in racketeering activity by falsely promising to complete the project for $15 million, by falsely promising to complete the project in a timely fashion, and by insisting on repayment of Flakt's costs in excess of $15 million.

1/ ABB Flakt, Inc. (the name by which Flakt, Inc. is now known) is wholly-owned by Asea Brown Boveri Inc. Asea Brown Boveri Inc. is wholly-owned by ABB Asea Brown Boveri Ltd., which in turn is owned in equal parts by Asea, AB, a publicly-traded Swedish corporation, and Brown Boveri Corporation, a publicly-traded Swiss Corporation. ABB Flakt, Inc. has no subsidiary companies except wholly owned subsidiaries.

SUMMARY OF ARGUMENT

This case was decided on the peculiar facts alleged by Vemco in its Amended Complaint. It does not present the "Questions Presented" set out in the Petition or any other broad or disputed question of law.

In this case, the Sixth Circuit *followed H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); its decision does *not* conflict with *H.J. Inc.* Nor does the decision in this case conflict with *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990), which was decided before *H.J. Inc.*

ARGUMENT

REASONS FOR DENYING THE WRIT

In this case, a Magistrate Judge, a District Court Judge and a three-judge panel of the United States Court of Appeals for the Sixth Circuit unanimously found that Vemco had failed to allege sufficient facts to satisfy the "continuity" component of a RICO "pattern" of racketeering activity under 18 U.S.C. §1962(c). None of the Sixth Circuit judges requested a vote on Vemco's suggestion for rehearing *en banc*. This case depends on its own peculiar facts, and there is no reason for reviewing the decision by writ of certiorari.[2/]

2/ The Sixth Circuit also affirmed dismissal of Vemco's (continued...)

I. The Petition Misstates The Questions Presented

This case does not present any of the three "Questions Presented" set out at pages i, 14, 16, and 17 of the Petition.

1. The Sixth Circuit did *not* devise a "single construction project" rule. It did *not* rule that predicate acts cannot constitute "multiple schemes" under RICO if they "relate to a single construction project." *See* Petition at i and 14. Rather, in a discussion of *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990), the Sixth Circuit stated that [A.10 (emphasis added)]:

> We do not find that a defendant who engages in several different forms of fraud for *a single purpose*, to defraud *a single victim* through activities surrounding *one construction project*, *without more*, has engaged in more than one criminal scheme.

Vemco failed to allege "more."

Furthermore, the Sixth Circuit, following *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), expressly stated that multiple schemes were *not* necessary to a RICO "pattern." [A.7.] Vemco relies on a mischaracterization of one sentence it plucks from the Sixth Circuit's opinion which was not crucial to its decision.

2/(...continued)
claim under 18 U.S.C. §1962(a). Vemco's Petition does not seek review of the dismissal of that claim.

2. The Sixth Circuit did *not* rule that acts in violation of a court order were "immunize[d] . . . from ever counting as part of a pattern of racketeering." *See* Petition at i and 16. It did *not* "implicitly conclude[] as a matter of law that oppressive conduct that violates a court order cannot constitute predicate acts for RICO." Petition at 16. The Sixth Circuit simply ruled that the act alleged by Vemco -- an alleged failure to turn over documents called for by a court order obtained by Vemco -- was "too unrelated and distinct" to be part of a "pattern" of allegedly fraudulent promises. [A.8.]

3. The Sixth Circuit did *not* rule that "the actions of alleged racketeers involving a single victim and a single scheme for a single purpose over four years" could never constitute a RICO violation. *See* Petition at i and 17. The Sixth Circuit ruled that the particular acts alleged by Vemco did not constitute a RICO violation (and that the alleged "pattern" lasted only 17 months).

II. The Petition's "Reasons" For Allowing The Writ Are Invalid.

A. The Decision Of The Sixth Circuit Does Not Conflict With This Court's Decision In *H.J. Inc. v. Northwestern Bell Telephone Co.*

Vemco stretches the opinion of the Sixth Circuit in this case well beyond its breaking point in an attempt to find a "conflict" between that decision and this Court's decision in *H.J. Inc.* There is no conflict.

Vemco correctly states that (Petition at 14)(emphasis added):

> In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) the Court held that the existence of only one scheme to defraud does not automatically preclude the finding of a pattern under RICO. *The Sixth Circuit recognized this holding in H.J., Inc. at page 7 of its opinion . . .*

Indeed, not only did the Sixth Circuit "recognize" this Court's holding in *H.J. Inc.*, the Sixth Circuit had concluded prior to *H.J. Inc.* that one scheme to defraud can, under the right facts, make up a RICO pattern. *See United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988)(two predicate acts potentially enough), cited in *H.J. Inc.*, 492 U.S. at 235 n.2; and *Blue Cross And Blue Shield Of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989)("[w]e agree with the Seventh Circuit that . . . [t]he proposition that the predicate acts must always occur as part of separate schemes . . . cannot be accepted as a general rule").

However, Vemco goes on to state that, "the Sixth Circuit *appears* to fall back to the multiple scheme test . . ." Petition at 14 (emphasis added). There is no such appearance. The Sixth Circuit did *not* "fall back" to an erroneous test that would be inconsistent with both *H.J. Inc.* and its own prior decisions.

Vemco also states that "the Sixth Circuit *appears* to have misread Vemco's allegations." Petition at 15 (emphasis added). Not true. The Sixth Circuit did not misread Vemco's allegations. Furthermore, the writ of certiorari is not designed to review a lower court's reading of a complaint.

B. There Is No Conflict Between The Sixth Circuit's Decision In This Case And The Decision In *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*

There is no conflict between the Sixth Circuit's decision in this case and the decision in *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990). *Procter & Gamble* was decided before this Court's decision in *H.J. Inc.*, and the Sixth Circuit noted that the court's definition of continuity in *Procter & Gamble* was "overinclusive in light of the Supreme Court's subsequent decision in *H.J. Inc.*" [A.10.]

There is no conflict between two cases dealing with different facts, one of which was decided before and the other of which was decided after *H.J. Inc.*

C. Errors By Other Courts In Other Cases Are Wholly Irrelevant

Contrary to the argument at Petition 20-22, the fact that various courts in earlier cases had erroneously required a conviction, "racketeering injury," multiple schemes or a profit generating purpose for a RICO violation is wholly irrelevant to the question of whether the Sixth Circuit in this case erred or whether its decision should be reviewed by writ of certiorari. Petitioners seem to argue that "other courts have been wrong in the past, so the Sixth Circuit is wrong here." Of course, that argument is specious.

Finally, it is *not* true that the Sixth Circuit ignored its decision in *Blue Cross And Blue Shield Of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989), and held that

"allegations of a single victim are . . . a barrier to stating a cause of action under RICO." Petition at 22. The Sixth Circuit held only that the allegations of Vemco failed to state a cause of action under RICO.

CONCLUSION

For the reasons stated above, we respectfully request the Court to deny the Petition.

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Respectfully submitted,

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